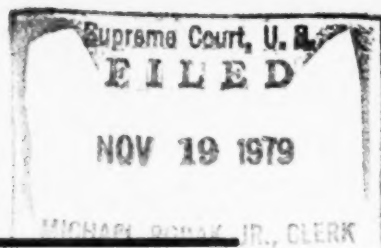


No. 79-397



In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS PIHAKIS AND JEROME DAVIDSON, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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Petitioners contend that a hearing was required to determine whether a co-defendant who was cooperating with the government in an unrelated matter was also an informant in the case at trial, even though the prosecution assured the court by affidavit that it had received no information from him relating to the trial and that it had not placed him in the defense camp.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner Davidson was convicted on four counts and petitioner Pihakis on ten counts of fraud and transportation of stolen securities, in violation of 18 U.S.C. 1341, 1343, and 2314; Pihakis was also convicted on one count of perjury, in violation of 18 U.S.C. 1623.¹ Davidson was sentenced

¹Davidson was acquitted of three counts charging fraud.

to concurrent terms of two years' imprisonment, to be served consecutively to a separate two-year prison sentence previously imposed in the United States District Court for the Northern District of Illinois; Pihakis was sentenced to a total of 11 years' imprisonment.² The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial, the sufficiency of which is not challenged here, established that petitioners participated as loan brokers in a massive advance-fee fraud, representing to investors that Kimberly Beers, Ltd., an investment company, owned a huge portfolio of blue-chip stocks when in fact it had access to very little. Davidson acted as a loan broker in two charged instances, fraudulently accepting advance fees in return for "guaranteed" financing that he never provided (Tr. 1663-1669, 1851-1852, 1859-1860, 1875-1876, 1922). Pihakis was instrumental in five separate instances of fraudulent conduct, making false representations about his ability to secure loans from various sources for advance fees (e.g., Tr. 862-871, 935-937, 953-956, 991, 997) and false claims about Kimberly Beers itself (e.g., Tr. 884, 1042, 1133, 1213). Pihakis attempted to conceal his role in the fraud from the FBI (Tr. 3409-3413, 3512-3517, 3303-3312) and perjured himself before the grand jury, denying his involvement or his false, lulling assurances to the defrauded parties (Gov't Exh. 95B-1).

2. While the jury was deliberating, it was revealed that Nicholas Agostino, a friend of several of the defendants, was a government informant in an unrelated case. After

²Two co-defendants were also convicted at trial. One was sentenced to a total of 11 years' imprisonment, and the other—the co-defendant who was cooperating with the government in an unrelated matter—became a fugitive prior to sentencing. Four other co-indictes pleaded guilty before trial.

an extensive hearing on this matter (Tr. 4574-4912), the court concluded that Agostino had not been placed in the defense camp by the prosecution in order to obtain information and that no information about the present case had been furnished to the prosecution. During the course of the hearing, an FBI agent was asked whether anyone at the defense table in the present case was also an informant. The agent responded that no one else was an informant "in this case" (see Pet. 3). The defense sought to discover the identity of the informant among the defendants, but the court declined to require its disclosure (*ibid.*).

The informant was in fact defendant Mayfield. The Assistant United States Attorney submitted an affidavit to the district court describing the activities of defendant Mayfield. This affidavit was kept under seal by the district court and was also submitted to the court of appeals under seal. However, the district court did discuss the contents of the affidavit in some detail during the sentencing hearing in this case. From the transcript of the sentencing hearing, it appears that Mayfield, on his own initiative, flew to Texas during the early weeks of the trial in this case and offered to become a cooperating witness (Sent. Tr. 25). An FBI agent advised the Assistant United States Attorney responsible for the case of this offer. The AUSA refused Mayfield's offer of cooperation but immediately informed Mayfield's attorney and the trial judge of it (*id.* at 26).

Shortly thereafter, Mayfield again contacted the FBI in Texas to cooperate in an unrelated matter with respect to certain stolen securities. The FBI again notified the Assistant United States Attorney, who authorized the FBI to enter into a written agreement with Mayfield under which the FBI would accept his cooperation "with respect

to criminal activity totally unrelated to the charges pending" in the present case (Sent Tr. 27). Moreover, as the district court found on the basis of the affidavit, the FBI agent in Texas "made it clear to Mayfield at the outset he didn't want to know anything about the trial in this case" (*ibid.*). The affidavit also stated that the prosecution had received no information from Mayfield relating to the present case (*id.* at 38-39) and that none of the defendants was a sham defendant (*id.* at 31). On the basis of these facts, the trial court found (*id.* at 29-30):

It is perfectly clear from everything that I know that Mr. Mayfield's efforts to get himself in a better position vis-a-vis a sentence in this case in no way was used by the prosecution in this case to help its presentation of its case; that the prosecution received no information from Mr. Mayfield with respect to this case; that precautions were taken from the very outset of Mr. Mayfield's earnest endeavors to make it clear that any relationships that the FBI had with Mr. Mayfield should be totally without any relationship to this case.

Petitioners were informed at the sentencing hearing that Mayfield was the informant (Sent. Tr. 25). By that time, Mayfield had become a fugitive, and we are informed that he has not yet been apprehended.

3. Petitioners contend (Pet. 8-12) that the district court's failure to conduct a hearing regarding Mayfield's activities at the time the FBI agent indicated that one of the defendants was an informant in another matter, rather than relying on the representations in the prosecutor's affidavit, requires reversal. This contention is without merit.

The district court made a factual determination, on the basis of the government's affidavit and its observations at trial, that Mayfield was not placed or utilized in the defense camp for the purpose of obtaining information about the case, that he was a bona fide defendant, and that he did not provide information regarding the ongoing trial in his negotiations or cooperation with the government (Sent. Tr. 30-31, 38-39; see also Pet. App. 4a-5a). That factual finding does not warrant review by this Court. And it is clear on the basis of this factual finding that no constitutional violation occurred. *Weatherford v. Bursey*, 429 U.S. 545 (1977).

In light of the government's representations, the present unavailability of Mayfield, and the absence of any showing by petitioners that they might have been prejudiced in any way or that any conflict of interest existed with respect to the trial at issue,³ the district court did not err in failing to conduct a hearing. *United States v. Mamone*, 543 F. 2d 457, 459 (2d Cir. 1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

³Contrary to petitioners' suggestion (Pet. 9), no conflict of interest was created by virtue of the fact that Mayfield was cooperating with the government in an unrelated matter, because Mayfield and petitioners were represented by different counsel (Sent. Tr. 6, 24-25).